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No. 79-1262

In the Supreme Court of the United States

OCTOBER TERM, 1979

GENERAL MOTORS CORPORATION, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) has not yet been reported. The decision of the Administrator of the Environmental Protection Agency (Pet. App. 73a-85a) appears at 43 Fed. Reg. 32182 (1978). A subsequent modifying letter (Pet. App. 86a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. A petition for rehearing was denied on September 17, 1979. The Chief Justice extended the time in which to file a petition for a writ of certiorari to and including February 14, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 209 of the Clean Air Act, 42 U.S.C. (Supp. I) 7543, is set forth at Pet. App. 94a-95a.

QUESTION PRESENTED

Whether the court of appeals correctly refused to set aside the Administrator's waiver of federal preemption, pursuant to Section 209(b) of the Clean Air Act, in respect of regulations adopted by the State of California that limit the amount of maintenance that a manufacturer can require of motor vehicle purchasers in the written instructions which accompany new vehicles sold in that State.

STATEMENT

1. Sections 101-216 of the Clean Air Act, 42 U.S.C. (Supp. I) 7401-7550, set forth a scheme for the regulation of emissions from new motor vehicles. Section 202 empowers the Administrator of the Environmental Protection Agency (EPA) to prescribe standards limiting the emission of

certain air pollutants from new motor vehicles. 42 U.S.C. (Supp. I) 7521. Section 206 concerns certification, a procedure in which the Administrator tests prototypes of new motor vehicles submitted by manufacturers to determine whether such vehicles conform with the standards prescribed under Section 202. 42 U.S.C. (Supp. I) 7525. If the tests show that the prototype conforms to the standards and related regulations the Administrator must issue a certificate of conformity to its manufacturer.

In order to relieve manufacturers of the burden of conforming to a multiplicity of emission standards established by different jurisdictions, Section 209(a) of the Act preempts states or local governments from adopting or enforcing any requirement relating to the control of emissions as a condition precedent to the initial retail sale, titling or registration of new motor vehicles or engines. 42 U.S.C. (Supp. I) 7543(a). But, in the special case of California, Section 209(b) requires the Administrator to waive this preemption unless he can make certain findings regarding California's regulations. 42 U.S.C. (Supp. I) 7543(b).[1]

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[1] Congress adopted and amended Section 209(b) as an exception to the preemption provision of Section 209(a), to allow California to continue its pioneering role in the regulation of automobile-related emissions. Congress recognized that California's efforts predated those of the federal government in response to an air pollution problem which was, and still is, the most pervasive and acute in the nation. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977). In 1977, Congress reaffirmed the special consideration afforded California by amending Section 209(b) "to ratify and strengthen

Under California law the State Air Resources Board (CARB) is responsible for adopting regulations controlling air pollution from new motor vehicles. After a series of public hearings and workshops, the CARB adopted regulations limiting allowable maintenance applicable to 1980 and subsequent model year gasoline-powered passenger cars and 1981 and subsequent model year gasoline-powered light duty trucks and medium duty vehicles. These regulations limit the scheduled maintenance to be performed on prototypes during certification.[2] To help insure that the in-use performance of production vehicles conforms to test vehicle performance during certification, the regulations, as originally promulgated, included provisions which limited the emissions-related maintenance that a manufacturer could require or

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the California waiver provision and to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare." H.R. Rep. No. 95-294, *supra*, at 301-302.

[2] One facet of certification is the durability testing of a prototype over 50,000 miles to determine the effects of deterioration on the functioning of the emission control system. Both federal and California certification procedures restrict the maintenance that may be performed during durability testing in order to encourage manufacturers to produce more durable vehicles and components. 40 C.F.R. 86.078-23, 86.078-26; Paragraph 3f, California Exhaust Emission Standards and Test Procedures for 1980 and Subsequent Model Passenger Cars, Light Duty Trucks and Medium Duty Vehicles, incorporated by reference in 13 Cal. Admin. Code § 1960(b), as amended September 30, 1977 [hereinafter 1980 Standards and Test Procedures] (A. 1690; "A." refers to the appendix in the court of appeals).

recommend to a vehicle purchaser to the level of maintenance permitted during certification[3] (A. 1204-1217). The regulations permit the CARB to grant exceptions for recommended maintenance related to safety and extreme operating conditions.[4]

The regulations limiting required or recommended maintenance for in-use vehicles reflected California's belief that manufacturers' maintenance instructions were not being followed and that much of the maintenance being performed was being done incorrectly. These factors, according to the State, led to inferior emissions performance of in-use vehicles compared to certification vehicles (A. 3, 1205-1206).[5]

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[3] "Required maintenance" refers to that maintenance which the manufacturers require as a precondition to statutory warranty coverage. "Recommended maintenance" refers to additional maintenance which the manufacturers advise but do not require as a precondition to statutory warranty coverage. The statutory warranties are mandated by Section 207 of the Act, 42 U.S.C. (Supp. I) 7541, which requires manufacturers to warrant that each new vehicle or engine is "free from defects in materials and workmanship" and will conform with applicable emission regulations throughout its useful life. As subsequently amended, the California regulations permit the manufacturers to recommend any maintenance they deem appropriate.

[4] 1980 Standards and Test Procedures ¶ 3g (A. 1691-1692).

[5] Petitioners challenged only those portions of California's regulatory scheme that limited required or recommended in-use maintenance; they did not challenge the limitations on scheduled maintenance during certification. In other words, the manufacturers did not claim that they cannot build a prototype capable of meeting certification requirements; rather, they claimed that they cannot build a production vehicle capable of meeting similar requirements when subjected to actual use.

2. California requested a waiver of federal preemption with respect to the limitations on allowable maintenance and in-use maintenance instructions. Following public hearings,[6] the Administrator granted the waiver request (Pet. App. 73a-85a), concluding that there was no plausible evidence that the restrictions on allowable maintenance would cause California's emission standards (for which a waiver had previously been granted) to be less protective of the public health and welfare than the corresponding federal standards (*id.* at 75a), and that the manufacturers had failed to show that adherence to the regulations would be technologically infeasible (*id.* at 76a-80a). In addition, the Administrator rejected, as beyond the scope of his review under Section 209 (b)(1) of the Act, petitioners' challenges to the constitutionality of the regulations and to the procedures by which California adopted the regulations (*id.* at 81a-82a, 83a-84a).

The CARB subsequently amended its regulations to permit manufacturers to recommend any maintenance they deem appropriate (Pet. App. 100a-101a); however, a vehicle owner's failure to have this additional recommended maintenance performed cannot be a defense to a warranty claim. The EPA informed California that these amendments fell within the scope of the waiver that had previously been granted (Pet. App. 86a-87a).

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[6] An initial hearing was held in August 1977. After enactment of the Clean Air Act Amendments of 1977, a second hearing was held to consider the effect of the amendments on a number of pending waiver requests, including the one at issue here (Pet. App. 75a).

The court of appeals denied the petition to set aside the Administrator's order (Pet. App. 1a-66a). The court concluded that (*id.* at 65a-66a):

> Congress has decided to grant California the broadest possible discretion in adopting and enforcing standards for the control of emissions from new motor vehicles. Section 209 of the Clean Air Act requires the Administrator to waive federal preemption of motor vehicle emission control standards and accompanying enforcement procedures for the State of California unless he makes certain findings that such a waiver is inappropriate. This power encompasses the power to waive federal preemption for in-use maintenance regulations designed as enforcement procedures for pre-existing standards. In evaluating whether a waiver is appropriate for enforcement procedures relating to standards for which a waiver has already been granted, the Administrator is required to address whether the procedures endanger the protectiveness of California's standards and whether the procedures are consistent with section 202(a) of the Clean Air Act. Those favoring the denial of the waiver carry the burden of demonstrating that the waiver is inappropriate. The petitioners here failed to carry that burden.

ARGUMENT

In a careful opinion, the court of appeals rejected petitioners' challenges to the Administrator's determination granting California's waiver request. The decision below is correct, does not conflict with any decision of this Court or other courts of appeals, and

concerns a statute bearing primarily on the right of one state to seek the best means of protecting the health and welfare of its citizens.[7] Accordingly, review by this Court is not warranted.

1. Petitioners argue (Pet. 8-10, 15-18) that the Administrator failed to perform a sufficiently demanding review of California's waiver application. They assert that the Administrator was required by Section 209(b) to conduct an intensive inquiry to determine whether California's regulations are arbitrary and capricious, whether the maintenance limitations are as protective of public health and welfare as applicable federal regulations, and whether California demonstrated a need for such regulations. Petitioners' argument is simply an attempt to rewrite the statute and is flawed in two major respects.

First, Section 209(b) does not impose a burden of persuasion upon California to demonstrate that a waiver is justified, nor does it impose a burden upon the Administrator to make any affirmative findings before granting a waiver. Rather, the statute is mandatory, compelling the Administrator to grant a waiver *unless* he can make one of the findings specified in subsections (b)(1)(A)-(C). As the court below observed (Pet. App. 49a):

[7] Section 177 of the Act, 42 U.S.C. (Supp. I) 7507, permits certain states that have not yet attained compliance with national air quality standards to adopt and enforce California standards for which the Administrator has granted a waiver. To date, no such state has adopted California's regulations.

> That [the Administrator] must deny a waiver if certain facts exist does not mean that he must independently proceed to make the opposite of those findings before he grants the waiver regardless of the state of the record.

Thus, a waiver proceeding contrasts sharply with other administrative proceedings in which a federal agency must make affirmative findings before taking a given action. The cases cited by petitioners (Pet. 15 n.10, 16) involving agencies operating under different statutes are therefore inapposite. The court of appeals correctly concluded (Pet. App. 49a) that under Section 209(b), California's regulations—and that State's determination that the regulations comply with the statute—are presumed to satisfy the waiver requirements; the burden of proving otherwise is upon the parties who oppose the grant of a waiver.

The legislative history of Section 209(b), as the court below noted (Pet. App. 51a n.51), "could not be less ambiguous on this [point]." Congress' express purpose in providing for a waiver of federal preemption was to afford California the broadest possible discretion in establishing regulations designed to mitigate the effects of the State's unique air pollution problems. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301-302 (1977). Indeed, in 1967 Congress specifically rejected a version of Section 209(b) that would have placed upon California the burden of demonstrating that a waiver was justified and required the Administrator to find affirmatively that

California had met that burden.[8] Accordingly, the Administrator has consistently placed the burden of proof on the parties opposing waiver to demonstrate grounds for making one of the findings necessary for a denial of a waiver request. See, *e.g.*, 40 Fed. Reg. 30311, 30314 (1975). As recently as 1977, Congress approved the Administrator's interpretation that Section 209(b) places the burden of persuasion upon the parties who oppose a waiver request. H.R. Rep. No. 95-294, *supra*, at 302.

Second, as the court of appeals concluded (Pet. App. 29a-35a), Section 209(b) distinguishes between "emission standards" and "accompanying enforcement procedures," intending the former to mean quantitative levels of emissions and the latter to mean methods for determining compliance with a standard. See S. Rep. No. 90-403, 90th Cong., 1st Sess. 32 (1967).[9] Section 209(b) does not require any protectiveness determination or demonstration of need

[8] Compare S. Rep. No. 90-403, 90th Cong. 1st Sess. 33-34 (1967), which accompanied the proposal that is now Section 209(b), with H.R. Rep. No. 90-728, 90th Cong., 1st Sess. 21-23, 69 (1967); see *id.* at 96-97 (separate views of Representatives Moss and Van Deerlin). Petitioners cite as "[t]he most salient legislative history on this question" (Pet. 16 n.11) the discussion in the House Report that accompanied a proposal which ultimately was *rejected* in favor of the Senate version. The court of appeals provided a complete discussion of the legislative history relating to this issue (Pet. App. 50a-52a), and we rely on that discussion here.

[9] This distinction is consistent with this Court's definition of the word "standards" in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 286 (1978).

with regard to accompanying enforcement procedures.[10] The protectiveness determination pertains only to emission standards, not to accompanying enforcement procedures such as the maintenance limitations. Similarly, the "need" referred to in Section 209(b)(1)(B) refers only to standards.

With regard to accompanying enforcement procedures, Section 209(b)(1) permits the Administrator to deny a waiver only if such enforcement procedures are inconsistent with Section 202(a).[11] The section contains no other reference to enforcement procedures. Thus, the Administrator was not required to consider whether the in-use regulations are as protective of the public health and welfare as applicable federal standards or whether the regulations are needed to meet compelling and extraordinary conditions, since these criteria apply only to standards.

[10] Section 209(b) provides that the administrator shall grant the waiver request unless he finds that: (1) California's determination that its *standards* will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious; (2) California does not need the *standards* to meet compelling and extraordinary conditions; and (3) California's *standards* and *accompanying enforcement procedures* are not consistent with Section 202(a) of the Act.

[11] California's standards and enforcement procedures are judged to be inconsistent with Section 202(a) if they provide insufficient time for the development and application of the requisite technology, giving appropriate consideration to the cost of compliance. 42 U.S.C. (Supp. I) 7521(a)(2).

To be sure, it is conceivable that enforcement procedures might, in some instances, have a direct bearing upon the protectiveness of California's emission standards. The CARB considered this possibility, but determined that the maintenance limitations would not lessen the protectiveness of its standards. (A. 279-280). In the waiver proceeding the Administrator was unable to find clear and compelling evidence that this determination was arbitrary and capricious (Pet. App. 73a-74a, 75a-76a).

Petitioners, however, assert (Pet. 9-10) that the record contains some evidence that the maintenance limitations will have an adverse effect upon air quality. The court of appeals reviewed the materials to which petitioners refer and upheld the Administrator's ruling (Pet. App. 56a-59a). There is no occasion for further review of this factual determination.

Contrary to petitioners' contention (Pet. 12), the court below was careful to note that in reviewing a waiver request the Administrator's "task is something more than ministerial" (Pet. App. 49a). The court indicated that there must be a discernable rational basis for the Administrator's decision, and that (Pet. App. 55a; footnote omitted):

> if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assertions of his own, he runs the risk of having his waiver decision set aside as arbitrary and capricious. His "burden" is the burden of acting reasonably.

The opinion of the court of appeals reflects a careful review of the record and the basis for the Administrator's decision. There is thus no basis for petitioners' contention that the lower court "acquiesced" in some sort of "ministerial" review. If petitioners wish to challenge the substance of the California regulations or the procedures under which they were promulgated, they may do so in the state courts of California.

2. Petitioners contend (Pet. 18-21) that the Administrator improperly refused to consider certain evidence which they presented to him in the course of the waiver hearing. This evidence concerned alleged consequences of the grant of a waiver upon automobile safety, fuel economy and competition within the automotive industry. Petitioners argue that these factors are embraced within the term "public health and welfare," as used in Sections 209(b)(1) and 202(a)(4). This contention is without merit.

As the court of appeals correctly concluded, the phrase "public health and welfare" in the statute refers to the effects of pollution on the environment (Pet. App. 43a; footnote omitted):

> Congress enacted the Clean Air Act as an attempt to improve the quality of the air. This concern with pollution was not confined to its adverse effects on humans, but extended as well to its impact on the economy. The terms "public health and welfare" thus encompass economic values, but only to reflect the economic costs of pollution, not the social costs of pollution control. This is evident in every context in which the terms appear.

See also H.R. Rep. No. 95-294, *supra*, at 34. The question whether the social costs of pollution control should be considered in a waiver proceeding is one for Congress to decide in the first instance, and, therefore, petitioners' arguments on this point must be addressed to Congress, rather than to the administrative agency or the courts.[12]

3. Petitioners argue (Pet. 21-22) that the Administrator should have ruled upon their constitutional challenges to the waiver request. But "[n]othing in section 209 requires [the Administrator] to consider the constitutional ramifications of the regulations for which California requests a waiver" (Pet. App. 36a). Petitioners' contention that an administrative agency has the inherent power to rule upon constitutional claims is unfounded. See *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534, 539 (1958); *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 242 (1968). The ruling of the court below on this point is perfectly consistent with decisions in other circuits.[13] In any event, petitioners

[12] Petitioners' reliance (Pet. 20 n.15) on *Gulf State Utilities Co.* v. *FPC*, 411 U.S. 747 (1973) and *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), is misplaced. As the court below pointed out (Pet. App. 44a-46a), those cases involved agencies operating under clear congressional mandates to consider antitrust implications in their administrative determinations.

[13] *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970), did not concern a constitutional *ruling* by the SEC, but rather the SEC's application of a *statutory* exclusion based upon the First Amendment. In *Plano* v. *Baker*, 504 F.2d 595 (2d Cir. 1974), the Second Circuit, correcting any possible misconceptions concerning its decision in *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), stated that an administrative agency may not consider constitutional challenges on the merits. 504 F.2d at 599 & n.6. In *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973), the Ninth Circuit ruled that constitutional adjudications must be left to the courts because such issues are beyond the expertise of administrative agencies. In *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1042-1043 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979), the Eighth Circuit struck down an FCC decision, ostensibly based upon First Amendment considerations, and held that without clear statutory authority the Commission had no jurisdiction to advance perceived constitutional interests on its own. Finally, in *Spiegel, Inc.* v. *FTC*, 540 F.2d 287, 294 (7th Cir. 1976), the Seventh Circuit ruled that federal administrative agencies cannot pass upon the constitutionality of administrative or legislative action.

were not deprived of a forum in which to present their constitutional claims, since those claims were passed upon by the court of appeals.

4. Petitioners' arguments (Pet. 22-24) on the merits of the constitutional issue must also fail. Their assertion that the California maintenance limitations violate the First Amendment by restricting communication between auto manufacturers and consumers overlooks the settled rule that commercial speech may be regulated if such regulation bears a rational relationship to a legitimate state interest. *Banzhaf* v. *FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969), cited with approval in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976). That is the case here. Studies conducted by the CARB found that a relationship exists between the failure of in-use vehicles to achieve emis-

sion standards and the amount of maintenance (or lack thereof) which a vehicle owner performs on emission-related components. The CARB determined that its maintenance regulations will force manufacturers to develop more durable engine components, thereby reducing the number of necessary maintenance operations; the CARB determined that this will, in turn, reduce the frequency of component failures due to lack of, or improper, maintenance (A. 1205-1209, 1629-1674, 1815-1819). Thus, the regulations are rationally related to the legitimate state interest of reducing automobile emission levels and are constitutionally permissible.

In any case, California's regulations do not restrict the manufacturers' communications with their customers. The regulations, as amended, only distinguish between required and recommended maintenance. Manufacturers are free to recommend any maintenance they deem appropriate; they simply may not deny a warranty claim on the basis of a failure to perform such recommended maintenance. Petitioners' assertion (Pet. 23-24) that automobile purchasers may ignore the manufacturers' recommendations does not implicate legitimate First Amendment concerns. The First Amendment's protection of freedom of speech "provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979), quoting *Hanover Township Federation of Teachers* v. *Hanover Community*

School Corp., 457 F.2d 456, 461 (7th Cir. 1972).[14]

5. Lastly, petitioners argue (Pet. 24-26) that the court below gave excessive deference to the Administrator's construction of the waiver provision. We disagree.

The court of appeals held (Pet. App. 17a) that it could not "conclude that the Administrator misconstrued Section 209 [unless] petitioners * * * show by clear and convincing evidence that his construction is unreasonable." This ruling correctly articulated the standard of deference which this Court has typically applied to a nearly contemporaneous construction of a statute by an agency charged with administering it. See *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979); *Union Electric Company* v. *EPA*, 427 U.S. 246, 256

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[14] The cases relied upon by petitioners (Pet. 22-23) are readily distinguishable, since they each concerned a virtually complete ban on the communication of certain information. See *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra. Consolidated Edison Company of New York* v. *Public Service Comm'n of New York*, No. 79-134, and *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, No. 79-565 (argued Mar. 17 1980), are similarly inapposite. *Consolidated Edison* involves an order prohibiting electric utilities from including messages on controversial matters of public policy with bills sent to consumers, and *Central Hudson* involves a ban on promotional advertising by such utilities. Here, however, the manufacturers are not prohibited from communicating with their customers. Moreover, unlike *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), this case does not concern the compelled publication of information by a newspaper.

(1976); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975). Thus, in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975), this Court ruled that EPA's interpretation of the Clean Air Act should be accepted so long as it is "sufficiently reasonable." And in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court held that an agency's interpretation of a statute which it is charged with administering "should be followed unless there are compelling indications that it is wrong, *especially when Congress has refused to alter the administrative construction.*" *Id.* at 381 (emphasis added; footnotes omitted).

The Administrator's construction of the waiver provision has been consistent.[15] In 1977 Congress not only declined to overturn that construction, but took steps "to ratify and strengthen the California waiver provision and * * * to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare." H.R. Rep. No. 95-294, *supra*, at 301-302. In these circumstances, the court below was fully justified in giving deference to the Administrator's construction.[16]

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[15] The Administrator has explained in detail the basis for his interpretation (A. 1853-1855) and has consistently abided by that interpretation.

[16] There is no possibility that another court of appeals will reach a different interpretation of Section 209, because exclusive review of California waiver decisions rests with the District of Columbia Circuit under Section 307(b) of the Clean Air Act, 42 U.S.C. (Supp. I) 7607(b).

Despite its deference to the Administrator's interpretation of Section 209(b), the court of appeals nevertheless undertook its own thoroughgoing examination of the language, legislative history and congressional purpose of this somewhat technical and complex provision. It was only after completion of that examination that the court of appeals concluded—correctly, we submit—that the Administrator's interpretation should be upheld.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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